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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 410

JOSEPH M. DAVID,

Petitioner,

vs.

JUNE STRELECKI, DIRECTOR OF DIVISION OF MOTOR VEHICLES, STATE OF NEW JERSEY.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

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TABLE OF CONTENTS.

	PAGE
Petition for a Writ of Certiorari	1
Opinions Below	2
Jurisdiction	3
Questions Presented	3
Constitutional Provisions Involved	4
Statement of the Case	5
Reasons for Granting the Writ	7
Conclusion	17

CASES CITED.

Ashcraft v. *Tennessee*, 322 U. S. 143, 88 L. Ed. 1192 (1944) 15

Atkinson v. *Parsekian*, 37 N. J. 143 (1962) 8

Blackburn v. *Alabama*, 361 U. S. 199, 4 L. Ed. 2d 242 (1960) 16

Cresse v. *Parsekian*, 43 N. J. 326 (1964) 8

Duncan v. *Louisiana*, 391 U. S. 145 (1968) 17

Gardner v. *Broderick*, 392 U. S. 273 (1968) 15

Gault, In re, 387 U. S. 1 (1967) 3, 13, 14

Grosso v. *United States*, 390 U. S. 62 (1968) 15

Haynes v. *United States*, 390 U. S. 85 (1968) 15

Marchetti v. *United States*, 390 U. S. 39 (1968) 15

Mathis v. *United States*, 391 U. S. 1 (1968) 15

Miranda v. *Arizona*, 384 U. S. 436 (1966) 3, 4, 7, 13, 16

PAGE

Murphy v. *Waterfront Commission*, 378 U. S. 52 (1964), 12 L. Ed. 2d 678 14

Rochin v. *California*, 342 U. S. 165 (1952) 16

Rogers v. *Richmond*, 365 U. S. 534, 5 L. Ed. 2d 760 (1961) 15

Spivack v. *Klein*, 385 U. S. 511, 17 L. Ed. 2nd 574 13

CONSTITUTIONAL AMENDMENTS CITED.

Fifth Amendment 4, 13

Fourteenth Amendment 4, 13, 15

STATUTES AND OTHER CITATIONS.

28 U. S. C. 1257 (3) 3

N. J. S. A. 2A:113–9 6

N. J. S. A. 2A:169–4 17

N. J. S. A. 39:4–82 6

N. J. S. A. 39:4–97 6

R. R. 1:2–1 (N. J.) 7

91 N. J. L. 4 (2/1/68) 16

American Bar Association Journal, Vol. 54, p. 577 (6/68) 17

APPENDIX A.

	PAGE
Opinion of Hon. Geo. B. Francis	1a
Findings and Recommendation of Hearing Officer, Division of Motor Vehicles, State of New Jersey	2a
Exceptions to Findings of Hearing Officer	7a
Memorandum of Decision of Director of Motor Vehicles, State of New Jersey	12a
Majority Opinion of Appellate Division, Superior Court of New Jersey	16a
Minority Opinion	29a
Opinion of Supreme Court of New Jersey	37a

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JUNE STRELECKI, DIRECTOR OF DIVISION OF MOTOR VEHICLES, STATE OF NEW JERSEY.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

Joseph M. David, your Petitioner, prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey entered in the above entitled case on May 20, 1968.

OPINIONS BELOW.

The opinion of Atlantic County (New Jersey) Judge George B. Francis on the motion to suppress evidence in the criminal division is set forth in the appendix submitted by your Petitioner on his appeal to the Appellate Division of the Superior Court of New Jersey at pages 18 (a) et seq. This appendix has been submitted as part of the record. The opinion of Judge Francis is also reproduced in Appendix A hereto, infra, page 1a.

The findings and recommendations of the Hearing Officer the New Jersey Division of Motor Vehicles are set forth in the appendix submitted by your Petitioner on his appeal to the Appelate Division of the Superior Court of New Jersey at pages 89 (a) et seq. This appendix has been submitted as part of the record. The findings and recommendations are also reproduced in Appendix A hereto, infra, page 2a.

The exceptions to the findings of the Hearing Officer of the New Jersey Division of Motor Vehicles are set forth in the appendix submitted by your Petitioner on his appeal to the Appellate Division of the Superior Court of New Jersey at pages 97a, et seq. This appendix has been submitted as part of the record. The exceptions are also reproduced in Appendix A, hereto, infra, page 7a.

The decision of the Director of the Division of Motor Vehicles of the State of New Jersey is set forth in the appendix submitted by your Petitioner on his appeal to the Appellate Division of the Superior Court of New Jersey at pages 102a, et seq. This appendix has been submitted as part of the record. The decision of the Director of the Division of Motor Vehicles is also reproduced in Appendix A hereto, infra, page 12a.

The majority and minority opinions of the Appellate Division of the Superior Court of New Jersey reported in 97 N.J. Super. 360 and 375 (1967) are set forth in the

appendix submitted by the Director of Motor Vehicles on her appeal to the Supreme Court of New Jersey at pages 37a, et seq. and 49a, et seq. This appendix has been submitted as part of the record. The majority and minority opinions of the Appellate Division of the Superior Court of New Jersey are also reproduced in Appendix A hereto, infra, pages 16a and 29a.

The opinion of the Supreme Court of New Jersey reversing the decision of the Appellate Division is set forth in Appendix A hereto, infra, page 37a and also reported 51 N. J. 563 (1968).

JURISDICTION.

1. The judgment of the Supreme Court of New Jersey entered May 20, 1968 (infra, Appendix A, page 37a). It is final by its terms.

2. The federal question was raised in the hearing in the Municipal Court, in the County Court on the Motion to Suppress evidence, at the hearing before the New Jersey Division of Motor Vehicles and in the exceptions to the findings of the Director of Motor Vehicles (Appendix of Joseph M. David to the Appellate Division of the Superior Court of New Jersey, page 97a, et seq.). This Appendix as heretofore stated has been submitted as part of the record. The Federal Question was argued in both the Appellate Division of the Superior Court of New Jersey and the Supreme Court of New Jersey.

3. The jurisdiction of this Court is invoked under 28 U.S. Code 1257 (3).

QUESTIONS PRESENTED.

The questions presented are:

1. Should not the suppression of evidence in a criminal proceeding for failure to comply with the warnings set down in *Miranda* v. *Arizona*, 384 U. S. 436 (June 13, 1966) as implemented by *In re Gault*, 387 U. S. 1 (1967) preclude

the admission of such evidence at an administrative hearing which could result in a forfeiture or is punitive in nature?

2. Was it not reversible error for the New Jersey Supreme Court to hold that the requirements expressed in *Miranda* v. *Arizona*, 384 U. S. 436 (1966), for admissibility of inculpatory evidence, are not applicable to a punitive administrative hearing before the Director of the Motor Vehicle Division of the State of New Jersey, at which Petitioner's license to drive a motor vehicle was suspended for two years?

3. Is not the suspension or revocation of a license to drive an automobile punitive in nature, at least in part, so as to require interrogating police officers to give the advice and warnings mandated by *Miranda* v. *Arizona*?

4. Was not the defendant motorist denied due process of law, as guaranteed by the Fourteenth Amendment, in the State's use against him at a license revocation hearing of evidence previously suppressed by a county court of the State because it was violative of fundamental fairness?

5. Under the Doctrine of Fundamental Fairness to the defendant, was it not reversible error for the New Jersey Supreme Court to hold that the Appellate Division improperly weighed the evidence in this matter when that appraisal was based on the record only?

CONSTITUTIONAL PROVISIONS INVOLVED.

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> "nor shall any State deprive any person of life, liberty or property without due process of law."

STATEMENT OF THE CASE.

On March 8, 1967, the Director of Motor Vehicles suspended the driving privileges of defendant for a period of two (2) years.

The suspension was the result of a fatal accident which occurred near Somers Point, N. J., on the early morning of August 24, 1965.

Defendant and two friends were in Somers Point after midnight before the fatal accident. They became involved in a disturbance near a bar, as a result of which the police were notified. Sergeant Lyn Bader of the Somers Point Police Department arrived at 1:15 A. M. and was with David continually until 2:00 A. M. He drove them to the police station and questioned them without placing any charges against them. Sergeant Bader, a qualified drunkometer expert, who had an excellent opportunity to observe David, testified that defendant was not under the influence of liquor and was able to drive when he left the police headquarters at approximately 2:00 A. M. on August 24, 1965. Defendant and his two friends left Somers Point on Mays Landing Road. They dropped off one en route and defendant and one Charles Teti proceeded, with defendant driving the car.

After traveling some 7.6 miles and negotiating some 18 curves, the car apparently blew a tire, left the road, and crashed down an embankment. One tire and wheel were never found. As a result of the crash Charles Teti was killed. The accident occurred at about 2:20 A. M.

Trooper Porter of the New Jersey State Police began an investigation at the scene of the accident and then proceeded to the Shore Memorial Hospital, where he questioned the defendant, who had been seriously injured in the accident and was under sedation. Trooper Porter testified that defendant didn't really know what he was talking about.

The Trooper then returned to the scene of the accident to complete his investigation.

On August 25, 1965, defendant was released from the hospital in the custody of Detective Heilfurth of the State Police. He transported defendant to Mays Landing Station of the State Police, where he obtained an unsworn, signed statement from the defendant. Heilfurth later admitted that at the time the defendant was "theoretically under arrest" and had not been advised of all his rights and was under sedation.

On February 1, 1966, the defendant had a preliminary hearing at the Egg Harbor Township Municipal Court and was later indicted for violation of N. J. S. A. 2A:113–9 —death by auto. A stenographic transcript of the Municipal Court hearing was made.

Upon timely motion of defendant and after hearings held in Mays Landing on August 10 and 17, 1966, before Hon. George B. Francis, the testimony of Trooper Porter and Detective Heilfurth was ordered suppressed.

Meanwhile, on April 5, 1966, a notice of proposed suspension of New Jersey driving privileges was sent to defendant by the Division of Motor Vehicles for alleged violation of N. J. S. A. 39:4–97 (careless driving without due caution and circumspection and in a manner so as to endanger a person or property) and 39:4–82 (failure to drive upon the right half of the highway), resulting in the death of Charles Teti, Bridgeton, N. J.

Defendant requested a hearing in the matter and the hearing was held on October 19, 1966. The Hearing Officer filed his findings and recommendations for a two-year revocation on November 30, 1966. The defendant filed exceptions to the findings and recommendations of the Hearing Officer on December 8, 1966.

On March 8, 1967, the Director of the Division of Motor Vehicles filed a memorandum decision suspending the driving privileges of the defendant for two years.

On March 14, 1967, Joseph M. David appealed to the Appellate Division of the Superior Court.

The matter was argued before the Appellate Division on September 11, 1967, and, on October 24, 1967, the Appellate Division reversed the Order of the Director in a 2-1 decision with Judge Carton dissenting in part.

The Director of Motor Vehicles pursuant to R. R. 1:2–1, filed the appeal to the New Jersey Supreme Court.

On May 20, 1968, the Supreme Court of New Jersey reversed the Appellate Division and remitted the matter to the Director of the Division of Motor Vehicles for modification of the penalty and this Petition for a Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT.

Petitioner believes that this case squarely presents an issue which has never been adjudicated and which should be determined. That issue involves the application of the *Miranda* rule and the doctrine of fundamental fairness to administrative hearings whose decisions could result in a forfeiture or which are punitive in nature. *Miranda* v. *Arizona,* 384 U. S. 436, 16 L. Ed. 2d 694 (1966).

In discussing the applicability of the *Miranda* doctrine in suspension or revocation matters before the Motor Vehicle Division, the Supreme Court of New Jersey took the position that there was no constitutional compulsion to use the doctrine where no "punitive sanctions are to be imposed." The Court was of the opinion that proceedings of the nature herein involved were not aimed at inflicting punishment on a driver but rather to foster safety on the highway. Suspension or revocation of a license, the Court said, was merely a matter of inconvenience to the driver.

The same court, however, has ruled that "while motor vehicle license revocations and suspensions are mainly designed to protect the public by removing the offenders from

the road (*Atkinson* v. *Parsekian*, 37 N. J. 143, 155 (1962)) they undoubtedly have *punitive incidents*, as well as deterrent effects which also serve to protect the public." *Cresse* v. *Parsekian*, 43 N. J. 326, 328, 329 (1964).

It is noteworthy that in the instant case, the New Jersey Supreme Court in the last sentence of its opinion remands the matter for a review of the "penalty" imposed. A "penalty" is indeed punitive in nature and character.

When the defendant was given a preliminary hearing on February 1, 1966, Trooper Earl W. Porter of the New Jersey State Police, who investigated the matter, testified on cross-examination as follows (pages 9a, 10a, 12a, 13a of the appendix of appellant submitted as part of the record):

"Q. Did you have occasion to talk to Mr. David at the hospital at 5:00 a.m. in the morning? A. Yes, sir, I did. He was under sedation at the time and so we didn't take a statement of any type at that time.

Q. What was his condition at that time? A. Well, he was admitted for observation. He was going to be kept for x-rays to be made the next day and he had been given a sedation when he arrived at the hospital.

Q. No, what was your observation of him at that time? A. Well, my opinion?

Q. No, your observation. What did you notice about him? A. What did I notice about him?

Q. He had passed out prior to your seeing him? A. Prior, yes. He was conscious when I arrived.

Q. Was he groggy? A. He was groggy, yes, sir, he was. He appeared to have been drinking, but we asked a nurse and she said that he had also been given sedatives to calm him.

Q. Well then, in your opinion—— A. He didn't appear to be injured.

Q. He didn't appear—did he appear to be drunk? A. Not drunk, sir, no, because he could talk.

Q. He had just been through a pretty rough experience? A. Yes, sir, he had."

and

"Q. Did Mr. David make any statements to you at the hospital when you arrived at 5:30 in the morning and he was under sedation? A. Did he make any statements to me, sir?

Q. Yes. A. Well, the usual statements, what happened. I was trying to get a statement from him at that time, but I saw that he was—*I didn't feel that he actually knew what he was talking about at that time.* He said he was going over 90 miles an hour at the time of the accident, and I knew he wasn't going to stick with that later on, so I didn't question him further.

Q. But you knew that at that time he didn't know what he was saying, is that the idea? A. *Well, yes, sir.*

Q. That is your opinion? A. That was my opinion, sir. That is why I didn't question him any further. I didn't think he was in any condition."

On the hearing to suppress evidence held in the Atlantic County Court (opinion submitted as part of the record in the appendix of the appellant and reproduced in appendix A hereto) the same Trooper Porter testified (pages 24a, 25a and 26a of appendix of appellant) on direct examination:

"Q. Thereafter, did you have occasion to do some further interrogation consisting of questioning of the defendant, Joseph David? A. My questioning of the driver that night was at the hospital.

Q. And when did you question him that night? A. It was at least two hours after the accident occurred before I got to the hospital.

Q. And what was David's condition at that time?

A. At that time he was under sedation. He had been given treatment there at the hospital.

Q. When you say he was under sedation, was he coherent? A. He was, I would say, *slightly incoherent, because he didn't seem to be too aware of the situation at that time.*

Q. Did he know you were a trooper? A. That I couldn't say, sir.

Q. Did you tell him you were a trooper? A. Yes, sir, I said we were State Police investigating an accident he was just involved in.

Q. What did he tell you? A. At that time he *was sort of mumbling and stating that*—when we asked him what had happened, he was saying that *he was* on his way *back to Bridgeton* and he *was traveling* at a high rate *of speed and missed the curve.*"

Q. When you say he was traveling at a high rate of speed, did he tell you how fast he was going? A. He mentioned a speed of 90 when he last looked at the speedometer.

Q. Had he been drinking? A. Yes, he had been drinking.

Q. How do you know he was drinking? A. By his admission. You could smell it, and by the fact that one of his other friends he had been with that night testified—gave me a statement to that effect.

Q. Now, you say he was incoherent. Was he answering your questions when you posed them to him? A. Yes, he was answering questions, but he wasn't looking at us at the time.

Q. He wasn't looking at you? A. No, he was making offhand remarks when we asked questions."

At the same hearing to suppress, the prosecution stated (appendix of appellant, page 26a):

> "Your Honor, *while it is true that the Trooper didn't apprise the defendant of any of his Constitutional rights, I mean, we could even stipulate that,* this goes to the weight of the testimony of the defendant's admissions to the Trooper, not to whether or not they are admissible. Here we have a man in the hospital. Granted, he was incoherent or he was mumbling, but this merely goes to the weight to be given, the probative value to be given the Trooper's testimony, not to whether or not it should be suppressed. There is no question about it that the defendant was not in custody, and Miranda speaks throughout the case of in custodial interrogation. This was merely an investigation to determine whether or not a crime had been committed, and at this point to suppress this evidence is unfair to the State and would prejudice the State unduly.
>
> Mr. McGahn: Your Honor, I believe that once the fact that Charles Teti had been determined that he was dead and David was identified as the driver of the automobile, the accusatory stage had been started and the investigatory stage had ended, and at that time he was entitled to be advised of his constitutional rights in that he had a right to counsel, not to make any statements against himself, and any statements made against himself could be used at a subsequent time.
>
> Further, being in the condition that he was under sedation, it is rather inconceivable that he really knew what he was saying at the time, anyway." (Italics added.)

Judge George B. Francis, who heard the argument on the Motion to Suppress Evidence in the Atlantic County Court, Criminal Division (referred to above) said:

"The case has two facets, really. One is the voluntariness of these statements, and there the evidence of sedation, incoherency, and such type of testimony is relevant to consider that. That goes beyond Miranda. That is dealt with in cases far prior to Miranda. *I think on that basis alone it could not be said that his testimony was or this admission was voluntarily given.*

"In addition to which you have the prohibition of Miranda itself. There the question comes in of whether or not he was in the so-called custodial setting, and there we have to consider what is relevant in that case in the consideration of the failure to apprise of the right to counsel and failure to apprise as to the incriminatory nature of his statements and so forth, and if we determine that it was a custodial setting, then the rest is automatic."

It is clear from the opinion of Judge George B. Francis, that the evidence sought to be used was constitutionally tainted. The evidence was not given voluntarily. There was evidence of sedation and incoherency. There was no compliance with *Miranda* requirements. The setting was custodial. *This suppressed evidence is the same evidence used against Petitioner in the administrative hearing and this is the evidence which Petitioner asserts should be subject to the same safeguards in the administrative hearing as it is the criminal hearing.*

The Supreme Court of New Jersey in its opinion cited herein, said:

"it is to be noted that the purposes of the *Miranda* decision were fulfilled here since the State was not permitted to use David's statements to impose criminal sanctions upon him under an indictment for the crime of causing death by automobile. N. J. S. A. 39:113–9. See Mathis v. United States, 391 U. S. 1 (1968)."

At the same time the Supreme Court stated that the *Miranda* doctrine which barred use of this evidence in the death by auto matter, could not be extended to the hearing on the revocation of Petitioner's driver's license. In short, the evidence was tainted and suppressed on the death by auto charge but clear and admissible on the charge which resulted in a two-year license revocation because the latter, the Court held, was not intended to fall within the ambit of criminal jurisprudence applicable to the death phase. The license revocation, the court held, was not punitive. A few sentences later, however, the Supreme Court concluded its opinion with a statement remanding the matter for a "review of the *penalty*" (of revocation).

In *Spivak* v. *Klein*, 385 U. S. 511, 17 L. Ed. 2d 574, the Court reversed the Appellate Division of the New York Supreme Court, which had ordered disbarment against an attorney for refusal to produce financial records at a judicial inquiry. The Court held that the self-incrimination clause of the Fifth Amendment which applies to the States through the Fourteenth, forbids the imposition of the sanction of disbarment as a penalty for remaining silent. *Spivak* was cited in the opinion of the Appellate Division of the New Jersey Superior Court but completely ignored in the opinion of the New Jersey Supreme Court.

Petitioner submits that the sanction of disbarment and the sanction of a driver's license revocation are similar in nature.

Miranda, it is true, dealt with murder, rape and other serious criminal charges, conviction for which would have resulted in the death penalty or long jail terms, while administrative hearings are usually for regulatory purposes, yet this Court in protecting constitutional rights said in *In re Gault*, 387 U. S. 1, 49, 18 L. Ed. 2d 527, 558 (1967):

> "Against the application to juveniles of the right to silence, it is argued that juvenile proceedings are 'civil' and not 'criminal' and therefore the privilege

should not apply. It is true that the statement of the privilege in the Fifth Amendment, which is applicable to the States by reason of the Fourteenth Amendment, is that no person 'shall be compelled in any criminal case to be a witness against himself.' However, it is also clear *that the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites. The privilege may, for example, be claimed in a civil or administrative proceeding if the statement is or may be inculpatory.*" (Emphasis added.)

Gault (a matter involving the rights of juveniles) stresses that it would be surprising if the privilege against self-incrimination were available to hardened criminals but not to children. Citing Mr. Justice White in *Murphy* v. *Waterfront Commission*, 378 U. S. 52 (1964) at 94; 12 L. Ed. 2d 678 at 704 this Court said:

"... The privilege can be claimed *in any proceedings, be it criminal or civil, administrative or judicial, investigatory or adjudicatory* ... it protects *any disclosures* which the witness may reasonably apprehend *could be used in a criminal prosecution or which could lead to other evidence that might be so used.*" 18 L. Ed. 2d 557.

This Court, in a recent case involving a policeman who was fired after an administrative hearing because he refused to sign a "waiver of immunity" before the Grand Jury, said:

"... the mandate of the great privilege against self-incrimination does not tolerate the attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of the loss of employment."

Gardner v. *Broderick*, No. 635, October Term, 1967 (June 10, 1968), 392 U. S. 273.

See also the following decided by this Court January 29, 1968 (October Term, 1967).

Marchetti v. *United States*, 390 U. S. 39;
Grosso v. *United States*, 390 U. S. 62;
Haynes v. *United States*, 390 U. S. 85;
Mathis v. *United States*, 391 U. S. 1.

The New Jersey Supreme Court in the instant case stated that:

> "the decision announced in *Miranda* by its terms deals with a problem of 'criminal jurisprudence' (*Miranda*, p. 439) and in no way mandates the extension of the exclusionary doctrine to administrative proceedings completely divorced from concepts of criminal law. We therefore hold that any voluntary relevant statement of a licensee may be used by the Director in determining whether highway safety requires the suspension or revocation of the license to operate a motor vehicle in this State."

Petitioner submits that the admissibility of evidence must be determined in accordance with constitutional standards which satisfy the due process clause of the Fourteenth Amendment. In short, any

> "defendant has the right to be tried according to the substantive and procedural due process requirements of the Fourteenth Amendment."

Rogers v. *Richmond*, 365 U. S. 534, 545 5 L. Ed. 2d 760 (1961).

See also:

Ashcraft v. *Tennessee*, 322 U. S. 143 88 L. Ed. 1192 (1944);

Blackburn v. *Alabama*, 361 U. S. 199, 206, 207 4 L. Ed. 2d 242, 248 (1960);

Rochin v. *California*, 342 U. S. 165 (1952).

This Court in *Miranda* (page 467), stated that:

> "today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves."

Without this protection and without adequate guide lines for the conduct of administrative hearings, the accused leaves himself open to a Star Chamber type of proceeding which courts should not countenance.

See "Administrative Tyranny" 91 New Jersey Law Journal, page 4 (issue of February 1, 1968).

In a recent editorial in the American Bar Association Journal, it was pointed out that certain basic weaknesses exist in the area of administrative law—

> "the expense of appeals from administrative decisions, the dilution of the rules of evidence in agency hearings, the lack of a right to jury trial, the failure to accord the rights of confrontation and cross-examination, limitations in the right to present argument, even the erosion of the rights of freedom from search and seizure and self-incrimination. The most immediate and apparent problems are the emotional bias of investigators and examiners and the immunity that too often may be extended to political campaign contributors."

See Article: "Let's Re-Examine Regulations" American Bar Association Journal, Volume 54, page 577, issue of June, 1968.

The article appropriately concludes with the statement that "Constructive reflection should include a balancing of the importance of freedom to the individual as a creature of God in developing his talents as against the activity of the State. One thing is certain: the present trend in administrative regulations must be changed."

Petitioner's license was revoked for 2 years. This meant that the revocation deprived him of his liberty and property rights in a license to drive an automobile for that length of time and was indeed punitive in nature. Deprivation of liberty for as long as 6 months and a $500. fine under the Federal system makes a matter serious enough to require trial by jury. In 49 of our 50 states jury trials are required where the penalty is a year in jail. Except for Louisiana, only New Jersey (under the Disorderly Persons Act N. J. S. A. 2A:169-4) which permits a one-year maximum sentence without a jury trial and New York State which provides for jury trial within New York City only for offenses with maximum sentences of over one year differ from the Federal Standard. In this light Petitioner's punishment by deprivation of his rights and liberty for two years was therefore punitive and should be subject to all the safeguards afforded by law in such cases. See *Duncan* v. *Louisiana*, 391 U. S. 145 (1968).

CONCLUSION.

For the reasons stated above, and especially in view of the fact that the Supreme Court of New Jersey has ruled that the tainted evidence used against Petitioner was properly suppressed in a criminal proceeding yet also held that the same tainted evidence could be used against the

same Petitioner in an administrative hearing arising out of the identical occurrence and resulting in a punitive penalty, it is respectfully submitted that the Petition for Certiorari should be granted. Judge Francis properly excluded evidence in the criminal proceeding against the Petitioner because the presence of sedation and incoherency made its admission fundamentally unfair. Procedural due process requires any hearing—criminal or administrative—to possess the element of fundamental fairness. The administrative hearing of Petitioner, by admitting tainted evidence, lacked the element of fundamental fairness.

Respectfully submitted,

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APPENDIX A.

OPINION OF THE HON. GEORGE B. FRANCIS ORDERING SUPPRESSION OF EVIDENCE IN CRIMINAL PROCEEDINGS.

The Court: *I don't quite agree with* the State that the question is one of the probative value of the testimony. I can conceive where the answers of a defendant in such a case might go to the weight rather than the admissibility, but I don't think this is such a case. The case has two facets, really. One is the voluntariness of these statements, and there the evidence of sedation, incoherency, and such type of testimony is relevant to consider that. That goes beyond Miranda. That is dealt with in cases far prior to Miranda. I think on that basis alone it could not be said that his testimony was or this admission was voluntarily given.

In addition to which, you have the prohibition of Miranda itself. There the question comes in of whether or not he was in the so-called custodial setting, and there we have to consider (18) what is relevant in that case is the consideration of the failure to apprise of the right to counsel and failure to apprise as to the incriminatory nature of his statements and so forth, and if we determine that it was a custodial setting, then the rest is automatic.

The Trooper very candidly and truthfully stated that he did not give the usual warnings indicated in Miranda. The facts indicate that the setting was custodial. The defendant was in a hospital. The Trooper was aware of the condition, had a premonition as to the condition of the decedent, was querying a defendant who was in a hospital room. I have heard no evidence that there was anybody in the room outside of the Trooper and the defendant, and while Miranda speaks of depriving the defendant in any significant way, and then I think as I indicated last week, there is some language in the case which says in any way,

I think that probably should be read in any significant way, of his freedom or liberty, you have a setting here where a man is in a hospital bed and obviously he couldn't be deprived of his liberty. He is in his bed. But the setting is such that he is confronted by a law enforcement official who is asking (19) questions which are nothing but incriminatory, and to say that this was non-custodial is to go beyond all extensions of any theory of investigatory and not accusatory.

It was custodial, I so find. Accordingly, the statements made and the statements sought to be suppressed will be suppressed.

FINDINGS AND RECOMMENDATION OF HEARING OFFICER, DIVISION OF MOTOR VEHICLES, STATE OF NEW JERSEY.

A hearing was held before me, Joseph A. Halsey, Senior Hearing Officer, Division of Motor Vehicles, on Wednesday, October 19, 1966.

The charge—it is alleged that Joseph M. David was the operator of a motor vehicle involved in an accident at approximately 2:20 a. m. on Tuesday, August 24, 1965, on Summers Point Road (County Road # 599), 3/10's of a mile west of Zion Road, Egg Harbor Township, Atlantic County, New Jersey.

It is further alleged that at the time of this accident, the Respondent was operating his motor vehicle in violation of the law; to wit: Section 39:4-97 R. S. (careless driving, etc.); Section 39:4-82 R. S. (failed to drive upon the right half of the highway) and that he did operate a motor vehicle after consuming alcoholic beverages which consumption of alcoholic beverages did affect his ability to properly and safely operate said motor vehicle.

This accident resulted in the death of Charles Teti of Bridgeton, New Jersey.

Joseph M. David was represented by Patrick McGahn, Jr., Esquire and Albert Davis, Esquire, appeared on behalf of the State.

Before the hearing, State Counsel afforded the Respondent's Counsel an opportunity to examine the Division's files concerning this accident.

The Respondent's Counsel furnished the Hearing Officer with a stenographic record of the proceedings, taken by a Certified Court Reporter.

CONCLUSION.

I have carefully examined the entire stenographic transcript of the proceedings.

I find that Trooper E. W. Porter testified upon arriving at the scene of the accident on August 24, 1965, he observed a 1965 Pontiac, which was overturned in an embankment on the Summer's Point Road and this Point was 240 feet west of a very sharp curve. The Respondent's vehicle had been proceeding west before this occurrence (page 11, line 2 through line 14).

The Respondent's vehicle appeared to have turned over at the time and it apparently had struck several trees as it turned over and down the embankment. The axle was broken, the front top and all sides of the car were also damaged (page 12, line 10 through line 15).

I further find that Trooper Porter verified that the Respondent's vehicle had left the roadway in the curve and traveled along the shoulder of the roadway, up to the point where it turned over down the embankment and he found no skid marks (page 12, line 16 through line 22).

I further find that Trooper Porter found Charles Teti, deceased, in the Respondent's vehicle at the scene (page 12, line 23 through page 13, line 7).

I further find that Trooper Porter testified that at the hospital where the Respondent was taken, he interviewed the Respondent in the emergency room and at that time the Respondent admitted to Trooper Porter that he was the driver of the motor vehicle involved in the accident. The Respondent further stated to him, that he was proceeding west on Summer's Point Road and that he had missed the curve and he didn't know what happened after that. He stated that the last thing he had remembered seeing, was the other boy traveling toward the back of the car and in the Emergency Room, the Respondent told him that the last he had looked at his speedometer before the accident, the vehicle was traveling 90 miles per hour (page 16, line 1 through line 25).

I further find that Trooper Porter stated that the Respondent had told him that he had a few drinks down in bars around Summer's Point area and that he smelled of alcohol. He did smell the alcohol on the Respondent's breath in the Emergency Room at the hospital (page 17, line 11 through line 18).

I further find that Trooper Porter verified that at the time of the accident, the weather was clear and the road surface was dry and visibility was good (page 17, line 22 through line 25).

I further find that Trooper Porter stated that he received a call to investigate this accident at 2:35 a. m. on August 24, 1965 and arrived at the scene at about 2:45 a. m. He further verified that the accident happened about 2:30 a. m. (page 18, line 8 through line 20).

I further find that Trooper Porter, at the scene, found 58 feet of tire marks in the shoulder on the roadway, made by the Respondent's vehicle, where it struck a guard rail, tore away a 26 foot section of the guard rail, and then traveled 162 feet along the shoulder and then overturned down the embankment (page 19, line 20 through page 20, line 2).

I further find that Detective F. P. Heilfurth, of the New Jersey State Police, was sworn and testified that he took

a written statement from the Respondent two days after the accident and this statement was identified into evidence as exhibit S-2 and is part of the hearing report.

I further find from the Respondent's own direct examination and cross-examination at the time of the hearing, that he could only remember that he was traveling west in the vicinity or on Mays Landing Road, on August 24, 1965 at approximately 2:20 a. m.

I further find, in Officer Bader's testimony of the Summers Point Police Department, that very shortly before this accident occurred, in meeting with the Respondent, he noticed an odor of alcoholic beverages on the Respondent's breath and that he had to settle a matter with the Respondent at a tavern in the area of Summer's Point, at a time not too distant from the time that this accident occurred.

INTERVIEW AFTER HEARING.

The Respondent advised the Hearing Officer that he has been licensed for an appreciable period of time and that he has been involved in three other accidents and an abstract of his driving record indicates that he has accumulated 13 points under the New Jersey Point System Regulation. The record consists of three careless driving violations and a speeding violation within a three year period.

The Respondent advised the Hearing Officer that for the past 2½ months previous to the hearing, he was employed as an airplane mechanic with the Air Works Corporation in Millville, New Jersey. Previously, he had been an Iron worker for 6 months and previous to that, a pipe fitter for 2 years. He has averaged in the past, a driving yearly mileage of 50,000 miles.

RECOMMENDATION.

I hereby recommend that the Respondent's driving privilege be revoked for a 2 year period and it is my con-

sidered opinion that all the State's charges have been substantiated and that the direct cause of this accident was the Respondent's careless operation of a motor vehicle at the time of the accident and that he failed to drive upon the right half of the highway. Testimony and evidence presented, also indicates by a preponderance of evidence that his ability to operate a motor vehicle properly and safely was affected by his consumption of alcoholic beverages.

In determining the period of revocation, I have taken into consideration, the Respondent's prior driving record, his need of a license and the violations that existed in this accident.

As previously stated, it is recommended that the subject's driving privilege in this State be revoked for a 2 year period and that he and his Counsel be so notified.

Respectfully submitted,

Joseph A. Halsey /s/
JOSEPH A. HALSEY
Senior Hearing Officer

JAH/kje

EXCEPTIONS TO FINDINGS OF HEARING OFFICER, DIVISION OF MOTOR VEHICLES, STATE OF NEW JERSEY.

(Letterhead of Patrick T. McGahn, Jr.)

December 8, 1966.

June Strelecki, Director
Division of Motor Vehicles
25 South Montgomery Street
Trenton, New Jersey 08625

Attention: Elmer A. Gombosi, Chief
Driver Improvement Bureau

Re: Joseph M. David
25 Taylor Street
Bridgeton, N. J.
Your File No. D0912 41074 09442

Dear Director Strelecki:

Reference is made to Chief Gombosi's letter of November 30, 1966, and to the Fatal Accident Hearing Report of Hearing Officer, Joseph A. Halsey, dated November 30, 1966, in the above named matter. As Counsel for Joseph M. David, I desire to file exceptions to the Hearing Officer's findings and recommendations as hereinafter set forth.

The Hearing Officer's Report reflects bias and prejudice against the respondent and his views are demonstrated by the fact that his findings are based solely on the testimony of the State's witnesses to substantiate the State's charges (Findings and Recommendations, pages 2-3). He distorted the testimony of Sergeant Lyn Bader of the Sommers Point Police Department, and ignored the testimony of witnesses Robert Ford, Edward Paul, Jr., and Leo T. Clark (Transcript of Testimony, pages 51-59, 60, 63-69). He arbitrarily overruled every objection of respondent counsel (pages 4-10, 14-16, 45, 75-76).

The Hearing Officer refused to disqualify himself from sitting in this matter after objection by respondent's counsel (pages 4-7). The Hearing Officer claimed he had not discussed the matter (page 4) nor had he reviewed the file prior to the Hearing (page 4), when in fact, he had telephonically discussed the facts in this matter with persons in the Atlantic City Prosecutor's Office (page 4), and, on the day of the Hearing, had been closeted in an office, prior to the Hearing, with Walter R. Davis, Jr., Trooper E. W. Porter and Detective F. P. Heilfurth of the New Jersey State Police.

The Hearing Officer's Findings are not supported by the testimony of all the witnesses. He relied solely on the testimony of Trooper E. W. Porter and Detective F. P. Heilfurth of the New Jersey State Police (Hearing Officer's Findings and Recommendations, pages 2-3). The investigating officers of the New Jersey State Police did not witness the fatal accident on August 24, 1965 (Transcript of Testimony, pages 20, 43). Trooper Porter could only testify as to the physical condition of the scene of the accident after it occurred. He could not, and did not testify as to the cause of the accident. Respondent's counsels objection to the testimony of Trooper Porter was overruled by the Hearing Officer (pages 8-10, 14-16). This was an erroneous ruling inasmuch as Judge George Francis in the Atlantic County Court, had previously entered an order finding that Trooper Porter's testimony was inadmissible, and this was furnished to the Hearing Officer. No mention of this fact was made by the Hearing Officer in his report (pages 8-10).

Information obtained from respondent by Trooper Porter and Detective F. P. Heilfurth was obtained illegally and should not have been admitted into evidence against respondent since he was not advised of all of his Constitutional Rights before he was interviewed by Trooper Porter or by Detective F. P. Heilfurth of the New Jersey State Police, and he was under the effects of sedation when interviewed by them. (pages 25-26, 30-32, 37-41, 44).

There was no evidence introduced at the Hearing that the respondent was operating his motor vehicle in violation of the law prior to, or at the time of the accident. The respondent testified that he was not driving in a careless and heedless manner and that he did not disregard the rights and safety of anyone traveling with him on August 24, 1965 (page 46). On August 27, 1965, the respondent furnished a statement that while operating his motor vehicle in a proper and safe manner on the Somers Point-Mays Landing Road on August 24, 1965, it suddenly went out of control on a curve, causing the car to cross over to the left side of the highway where it crashed into bridge railing and trees, causing it to overturn at the Powell Creek Bridge (pages 69-70). Witnesses testified that the left rear tire was not found, after a search at the accident scene, and it is reasonable to assume that a fire failure caused the accident (pages 21, 61-65).

There was no evidence introduced at the Hearing that the respondent had operated a motor vehicle after consuming alcoholic beverages, which consumption of alcoholic beverages did affect his ability to properly and safely operate said motor vehicle. On the contrary, while respondent admittedly has consumed some beer hours before the accident, a police officer, Sergeant Lyn Bader of the Somers Point, N. J. Police Department, testified that after he had been called to a tavern because of an argument there, he interviewed the respondent at police headquarters, after this incident, and in his judgment, the respondent was not under the influence of alcoholic beverages and he permitted the respondent to drive his automobile. Sergeant Bader testified that he is a qualified drunkometer operator and is a qualified expert on determining a drunken driver. He testified that the respondent was not drunk. He also testified that he would not have permitted the respondent to drive the motor vehicle if the respondent had been under the influence of alcoholic beverages. He was the last person to speak with the respondent and his companion before the accident, (pages 51-59).

Evidence was presented that the respondent had to drive seven and six tenths of a mile and had to negotiate eighteen (18) curves in the road before the accident occurred after leaving the police station on August 14, 1966 (pages 66-68).

An impartial evaluation of all the evidence reflects that the only witness to the accident itself was the respondent, Joseph M. David. No witnesses were produced by the State who were competent to testify or to prove that the respondent on August 24, 1965, was operating his motor vehicle in violation of Section 49:4-97 R. S. (careless driving, etc.), or Section 39:4-82 R. S. (failure to drive upon the right half of the highway). Nor was any evidence presented at the Hearing to prove that the respondent did operate a motor vehicle after consuming alcoholic beverages which consumption of alcoholic beverages did affect his ability to properly and safely operate said motor vehicle.

To find the respondent guilty of these charges would require the exercise of supposition, inferences, and innuendoes not supported by the facts. The accused is still protected by the cloak of presumption of innocence, and should be found guilty only after a preponderance of evidence is submitted proving him guilty.

The Hearing Officer manifested his bias against the respondent when he did not consider favorable inferences from the evidence presented by respondent's witnesses. He did not base his findings and recommendations on all of the evidence produced at the Hearing. Based on all the evidence which could legally be used against the respondent, the Hearing Officer could not, and should not have reached the findings set forth in his report and should not have made the recommendation that the respondent's driving privileges be revoked for a two year period.

The testimony of the respondent and his witnesses clearly demonstrated by the preponderance of the evidence elicited from them, that the respondent was, in fact, operating his motor vehicle in a safe and normal manner and that none

of his faculties or abilities to operate a motor vehicle were impaired by the consumption of any alcoholic beverages.

Therefore, it is respectfully requested that the Director of Motor Vehicles reverse the findings and recommendations of the Hearing Officer and find and determine that the respondent was operating his motor vehicle in a normal and safe manner with due regard to the rights and safety of the person traveling with him on August 24, 1965.

Respectfully,

Patrick T. McGahn, Jr. /s/
PATRICK T. MCGAHN, JR.

McG/C/gp

MEMORANDUM OF DECISION OF DIRECTOR OF MOTOR VEHICLES, STATE OF NEW JERSEY.

LETTER.

(Letterhead of State of New Jersey
Division of Motor Vehicles)

March 8, 1967.

Patrick T. McGahn, Jr., Esq.
1421 Atlantic Avenue
Atlantic City, New Jersey 08401

Dear Sir:

Enclosed you will find Memorandum Decision entered by Director June Strelecki and copy of notice forwarded to your client, Joseph M. David, which is self-explanatory.

Very truly yours,

Elmer A. Gombosi, /s/
ELMER A. GOMBOSI,
Chief,
Driver Improvement Bureau.

ER
Encl.
Registered

MEMORANDUM DECISION.

This matter came on for a hearing before a Hearing Officer of this Division on October 19, 1966. The respondent was represented by Patrick McGahn, Jr., Esquire, and the State by Deputy Attorney General Albert Davis. Testimony was recorded stenographically.

Copy of a report and recommendation by Senior Hearing Officer Joseph A. Halsey was provided counsel for his ex-

amination. Counsel filed certain exceptions to said report and recommendation in letter of December 8, 1966. This matter now comes before me for final review and determination of the record made before the Hearing Officer, including the Hearing Officer's report and the exceptions filed by counsel.

According to the evidence adduced at the hearing, the accident occurred on August 24, 1965, at approximately 2:30 a. m. on Sommers Point Road (County Road 559) .3 of a mile west of Zion Road, in Egg Harbor Township, Atlantic County, New Jersey. The weather was clear and the roadway dry at the time of the accident. Respondent had been operating his vehicle in a westerly direction on Sommers Point Road. His vehicle left the roadway, struck a guard rail, several trees and subsequently overturned. The victim was a passenger in respondent's vehicle. No other vehicles were involved.

It is well established that although the mere happening of an accident does not of itself bespeak of careless driving, a vehicle solely under the control of its driver does not ordinarily leave the roadway and collide with a tree unless there is some outside intervening force which interfered with the driver's exercise of control. Counsel argues that the left rear wheel and tire of the vehicle were not found after the accident occurred, which indicates, according to counsel, that the left rear tire blew out causing the vehicle to go out of control. The severe damage sustained by the vehicle in the accident probably accounts for the wheel being dislodged from the vehicle. In any event, other testimony convinces me that respondent's careless operation of his vehicle was the proximate cause of the accident. One of the investigating officers testified that respondent told him orally that he had been proceeding at a speed of 90 miles an hour or more before the accident occurred. In a written statement given the day after the accident, respondent said that he couldn't estimate his speed but knows that he was going over the speed limit. In his testimony at

the hearing respondent says he could remember nothing about the accident except that he was driving at the lawful speed limit of 50 miles per hour. The credibility of respondent's testimony is impaired considering that the day after the accident he related specific details of his activities on the night of the accident and was able to recall with remarkable clarity details of the accident in an interview with an investigator which he, himself, had employed. Yet at the hearing he remembers nothing except that he was driving lawfully.

Counsel argues that the oral and written statements of respondent should not have been admitted into evidence since the same evidence had been supressed by the Atlantic County Court in a criminal proceeding on the charge of causing death by auto. I am satisfied that the admission of that evidence in this administrative proceeding was proper.

Based on a preponderance of the believable evidence adduced at the hearing, it is my finding that the respondent was in violation of R. S. 39:4-97 (careless driving; without due caution and circumspection and in a manner so as to endanger a person or property), R. S. 39:4-82 (failed to drive upon the right half of the highway), and that he did operate a motor vehicle after consuming alcoholic beverages which consumption of alcoholic beverages did affect his ability to properly and safely operate said motor vehicle, and that these violations did cause an accident to occur which resulted in the death of Charles Teti.

In determining the appropriate remedial sanction to be imposed in this matter, I have considered the degree and nature of respondent's violations, his age and prior driving record which reveals accumulation of 13 points under the Point System Regulation, and his need of a driver's license to commute to his place of employment.

It is, therefore, on this 24th day of February, 1967, ORDERED that the driving privilege of Joseph M. David be

and the same is hereby suspended effective immediately and for a period of two years from the date his driver's license is received in the Division of Motor Vehicles.

June Strelecki /s/
JUNE STRELECKI
Director

JS/md

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

A-735-66

JOSEPH M. DAVID,

Appellant,

vs.

JUNE STRELECKI, Director of Motor Vehicles,

Respondent.

MAJORITY OPINION OF APPELLATE DIVISION— SUPERIOR COURT OF NEW JERSEY.

Argued September 11, 1967—Decided October 24, 1967.

Before Judges Goldmann, Kilkenny and Carton.

On appeal from order of the Division of Motor Vehicles.

MR. PATRICK T. McGAHN, JR., argued the cause for appellant.

MR. JOSEPH A. HOFFMAN, Assistant Attorney General, argued the cause for respondent (MR. ARTHUR J. SILLS, Attorney General of New Jersey, attorney; MR. ALAN D. KIRBY, Deputy Attorney General, on the brief).

The opinion of the court was delivered by KILKENNY, *J.A.D.*

On February 24, 1967, the Director of the State Division of Motor Vehicles (hereinafter "Director"), following an administrative hearing, found that Joseph M. David drove his automobile on August 24, 1965 in Egg Harbor Township carelessly, in violation of *R. S.* 39:4–97, failed to drive upon the right half of the highway, in violation of *R. S.* 39:4–82, and operated the motor vehicle after consuming alcoholic beverages, which consumption of alcohol beverages affected

his ability to operate the automobile properly and safely, and that these violations caused an accident to occur which resulted in the death of Charles Teti. The Director ordered David's driving privileges suspended for a period of two years.

David appeals from this final decision, pursuant to *R. R.* 4:88–8. We stayed suspension of his driving privilege pending determination of the appeal.

David contends that evidence suppressed by the County Court in a criminal proceeding stemming from this same accident should not have been admitted at the administrative hearing and could not properly form a basis for the Director's action, especially since such evidence was obtained in a custodial setting while he was under sedation. He also maintains that the findings of fact were not supported by adequate admissible evidence to warrant suspension of his driving privilege.

The happening of the accident itself, with its fatal consequences, and the physical aspects thereof, are not in dispute. On August 24, 1965, a clear dry day, at about 2:20 A.M., David was driving his automobile in a westerly direction on Somers Point Road in Egg Harbor Township, Atlantic County. At a very sharp curve in the road, at a point where the road passes over Powell Creek, the vehicle left the roadway, traveled 58 feet on the shoulder thereof as evidenced by tire marks on the shoulder only, struck and tore away a 20-foot section of guardrail, then traveled 162 feet further along the shoulder, overturned down an embankment, striking several trees as it turned over and down the embankment, and finally came to rest on its side. Charles Teti, a riding companion of David, was killed in the accident. The automobile was extensively damaged, the rear axle was broken and the left rear tire and wheel were never recovered.

There were no eye witnesses to the accident other than David as driver and his friend Teti, who had been riding

on the passenger's side of the front seat. David climbed out of the car to go for help, went to a house about 300 yards up the street, and there either he or an occupant of the house called the police. The police arrived at about 2:45 A.M. At that time the rescue squad was removing Teti from the vehicle. Both he and David were taken by ambulance to Somers Point Hospital.

When Trooper Porter of the State Police, who investigated the accident, arrived at the hospital at about 5 A.M., after having made a partial investigation at the scene, he was informed by the nurse in the emergency room that Teti was dead. His lips were thus sealed by death. Prior to the police officer's arrival David, who had been suffering apparently greatly from shock as the result of the accident, had been given sedatives—a pill and an injection. He was asleep when the trooper arrived. The nurse awakened him and the trooper began to question him forthwith, knowing then from the fact that Teti was dead and the information gathered by him at the scene that David faced a possible charge of manslaughter by automobile, *N. J. S.* 2A:113–9, as well as charges for violating the Motor Vehicle Act, and their serious consequences. The questioning was pursued by this police officer even though, as he frankly admitted, David was in a "groggy" condition, but "not drunk," and was under sedation and "incoherent" in his responses, and without any advice or warning being given to David as to his rights to remain silent, to have counsel and the like. In fact, this same police officer swore to a complaint against David for manslaughter by automobile, *N. J. S.* 2A:113–9, on the following day. We shall discuss hereinafter the particular inculpatory admissions as to speeding and beer drinking allegedly made orally by David in the hospital emergency room to this trooper and the use of this evidence by the Director as a basis for her findings.

On the following day, August 25, 1965, at about 10:37 A.M., another police officer, Detective Heilfurth, picked up David at the hospital, brought him to State police head-

quarters at Mays Landing and there, while this shocked individual was still under sedation from a hospital-administered "needle and a pill," took a signed written statement from him. David again made incriminating admissions therein as to speeding and beer drinking. Here again, no specific warning or advice was given to him by this police officer as to his right to remain silent, or that the statement might be used against him. The statement, however, contains a recital that he was advised that the statement must be voluntary and he had a right to consult an attorney before giving the statement. He was apparently not advised that the State would furnish an attorney if he wanted one and was unable to engage his own. Thus some, but not all of the warning specified in *Miranda* v. *Arizona*, 384 *U. S.* 436 (1966), were given. This statement, with its pertinent particulars hereinafter noted, was also used by the Director as another basis for her findings.

When David was thereafter indicted for a violation of *N. J. S.* 2A:113–9, his attorney moved in the Atlantic County Court before Judge Francis in August 1966 to suppress the oral statement given by David to Trooper Porter at the hospital and also to suppress the written statement of David taken by Detective Heilfurth on August 25, 1965 when David, as this officer expressed it, was "theoretically under arrest," although not "formally" so in those "exact words." He was then in the custody of the police at headquarters whence he had been taken as aforesaid.

Judge Francis took the testimony of the police officers in connection with the motion to suppress and on the basis thereof granted the motion. He found that the warnings expressed in *Miranda* v. *Arizona, supra,* decided June 13, 1966 before the hearing of the motion, had not been given by either police officer, and that David was in a "custodial setting" when the statements were obtained, considering all of the attendant circumstances. Moreover, Judge Francis found that the evidence of sedation—present when both statements were taken, albeit apparently more so in the

case of the initial oral statement when David was admittedly incoherent—precluded admissibility under the cases prior to *Miranda*.

The State did not seek leave to appeal the order suppressing the two statements to the police. Instead, in the face of an absence of adequate proof to establish the charge in the indictment, an order was entered on the State's own motion dismissing the indictment without any trial.

The Director went forward with the administrative hearing to suspend David's driving privilege, notwithstanding dismissal of the indictment. The Director had a right to do so notwithstanding a disposition of the criminal proceedings in the motorist's favor. *Atkinson* v. *Parsekian*, 37 N. J. 143, 151 (1962). Over the objection of David's attorney, Trooper Porter and Detective Heilfurth testified before the Division hearer as to what David had told them. Their testimony included the admissions of speeding and beer drinking allegedly made by David in the respective oral and written statements. It is abundantly clear from the Director's decision that she relied substantially upon this evidence, previously suppressed by order of the County Court, as well as upon the police testimony as to the physical aspects of the accident in her findings. For example, the Director uses as a basis for a finding of speeding that David told Trooper Porter that "he was proceeding at a speed of 90 miles an hour or more before the accident occurred." Again, she relied heavily upon David's having told the police officers that he had consumed four or five beers some hours before the accident, in her finding that David's ability to drive his car safely had been impaired by his having consumed alcoholic beverages.

Generally, there is no necessity at administrative hearings to apply the rules of evidence strictly. Inadmissible evidence may creep into the record but its presence does not *ipso facto* mandate a reversal of the administrative determination, as might be the result in a judicial proceeding tried before a jury. However, administrative decisions

must be based on admissible, competent and substantial evidence in the record. As a corollary thereto, if the administrative determination lacks legal support and is based upon inadmissible, incompetent or nonsubstantial evidence, it lacks validity.

Procedural due process of law is guaranteed to every person by the Fifth and Fourteenth Amendments to the United States Constitution. The Fifth insures against action by the Federal Government, and the Fourteenth against action by the State or its agencies. Procedural due process is not limited to criminal proceedings. It is equally applicable to civil proceedings, including administrative hearings. *Weaver, Constitutional Law* (1946), § 286, *p.* 420. A revocation or suspension of driving privileges is deemed to be civil in nature. But its result can be a deprivation of liberty and of the property rights in a license to drive an automobile. *Bechler* v. *Parsekian*, 36 *N. J.* 242, 257 (1961). As we stated in *Parsekian* v. *Cresse*, 75 *N. J. Super.* 405, 411 (*App. Div.* 1962):

> "The fact remains that today the very livelihood of a man and his family may depend on his license."

David's need to have a driver's license to commute expeditiously to his place of employment as an ironworker was recognized by the Director in her decision.

While suppression by the County Court of the statements made by David to the two police officers in connection with a criminal proceeding is not automatically binding at the administrative hearing, the rationale which prompted the suppression ought not to be lightly disregarded. Judge Francis properly ruled that the evidence of David's having received sedatives and of his "incoherence" justified exclusion of statements made by him while in such a condition upon the basis of decisions long prior to *Miranda*. This was a recognition that procedural due process requires any hearing, judicial or *quasi-judicial*, to possess the element of fundamental fairness. For example, it would be funda-

mentally unfair and violative of procedural due process to try a man for drunken driving speedily while he is still drunk, even though defendant's then presence before the magistrate would leave no doubt as to his condition. See, too, *Rochin* v. *California*, 342 *U. S.* 165 (1965), in which the incriminating evidence was literally pumped from the person's innards.

The testimony of Trooper Porter as to the results of his questioning David in the hospital emergency room should have been excluded at the administrative hearing as a matter of fundamental fairness. Its admission was violative of procedural due process. It was prejudicial and reversible error for the Director to have relied upon this testimony as a basis for her findings.

The Trooper admitted that he knew from talking with the nurse that David had been given sedatives by her in the hospital emergency room, was asleep when he arrived and was awakened by the nurse for questioning by him in the emergency room. In the words of this witness, "He was a bit groggy after having been awakened." Admittedly, no warning or advice was given to this young man as to his rights to remain silent and to have counsel.

It may be that the Director did not have before her the full record which has been presented to us and which includes this trooper's testimony before the local magistrate and before Judge Francis. The Director makes no objection to the inclusion thereof in the appendix and we have, of course, examined the same in the exercise of our original jurisdiction. *New Jersey Constitution of 1947, Art* VI, *Sect.* V, *par.* 3.

Before the magistrate the trooper frankly stated:

> "I was trying to get a statement from him at that time, but I saw that he was—*I didn't feel that he actually knew what he was talking about at that time.* He said he was going over 90 miles an hour at the time

of the accident, and I knew that he wasn't going to stick with that later on, so I didn't question him further." (Emphasis added.)

Before Judge Francis in the County Court Trooper Porter described David at the emergency room questioning as "slightly incoherent, because he didn't seem to be aware of the situation at that time." And again, "he was sort of mumbling."

Even though the trooper immediately abandoned all further questioning of David once he said he was going "over 90 miles an hour," simply because, as the trooper expressed it, "I didn't think he was in any condition," the Director accepted David's alleged admission of such excessive speeding as a basis for concluding that he drove at such a high rate of speed. Fundamental fairness required rejection, as an evidentiary support for a license suspension, of admissions made by a person during a period of sedation which had produced incoherency in the declarant and an awareness in the questioner, "I didn't feel that he actually knew what he was talking about at that time."

II.

In the written statement given by David to Detective Heilfurth at the State Police Barracks in Mays Landing on the morning of August 25—which statement had also been suppressed by the County Court, as aforesaid—David stated that he could not estimate how fast he was going just before he hit the side of the road, "but I knew I was going over the speed limit." The speed limit was not specified. He also admitted that he had "about 3 beers, 4 beers" at Tony Mart's—"12 ounce bottles," and that he and his two friends had consumed a "six-pack" prior to going to Tony Mart's. He did not, according to the statement, remember what caused the accident.

When asked at the time of the statement if he was "presently under medication," David had answered, "They

gave me a needle and a pill at the hospital. I don't know what they were, they said they would calm my nerves."

At the administrative hearing David did not remember giving this statement, or the earlier oral statement to Trooper Porter. He testified that he was proceeding within the speed limit of 50 miles per hour and not driving in a careless and heedless manner at the time and place in issue.

Even were we to deem this written statement admissible at the administrative hearing—it was admitted in evidence over objection and relied upon by the Director in her decision—its probative value was far outweighed by the other evidence in the case. The finding by the Director, that David's ability to drive his automobile safely and properly was impaired, was not justified upon the basis of the entire record, as hereinafter noted. Moreover, the statement, unsworn in character, was taken when David was under sedation and did not remember giving it. Any admission therein as to speed was contradicted by his sworn testimony at the hearing that he was traveling within the 50-mile speed limit.

We find it unnecessary herein to decide whether the constitutional guarantee against self-incrimination, as defined in *Miranda* v. *Arizona, supra,* extends beyond the realm of purely criminal proceedings to civil forfeitures, such as the loss of a license to drive an automobile. But see *Spevack* v. *Klein,* 87 *S. Ct.* 625 (1967), a disbarment proceeding, and *Garrity* v. *New Jersey,* 87 *S. Ct.* 616 (1967), as to the right of a policeman to invoke the Fifth Amendment under threat of a loss of his position, if he does so.

III.

The Director's finding that David's consumption of alcoholic beverages "did affect his ability to properly and safely operate said motor vehicle" is not supported by any substantial evidence in the record. The conclusion is a mere "*Post hoc, ergo propter hoc.*" On the contrary, there

was substantial credible evidence that the few beers consumed by David had not impaired his ability to drive properly and safely.

The only evidence as to David's drinking consisted of the following. In the inadmissible statement to Trooper Porter in the hospital emergency room David told the trooper that "he had had a few drinks down in the bars around the Somers Point area." The trooper said that David "smelled of alcohol also," but he was "not drunk." In the written statement taken by Detective Heilfurth, David asserted that he and two friends, sometime between 10:30 P.M. and 12 midnight, had consumed a "sixpack" of beer before going to "Tony Marts" at the Point. The three of them were at "Tony Marts" from about midnight until about 1 P.M., during which time he had "about 3 beers, 4 beers,"—12-ounce bottles.

On the other hand, Sergeant Bader of the Somers Point police testified that he saw David at about 1:15 A.M. on August 24, 1965 at the City Hall in Somers Point—estimated by him to be about six miles from the scene of the fatal accident—and talked with him until David left City Hall between 1:45 and 2 A.M. According to this police officer, who incidentally is a qualified drunkometer operator, David was not drunk. As he put it, "He might have had a drink or two but he was not under the influence, no, sir." He stated that if David were under the influence at that time, he would not have let him go out and get in his automobile and drive off. He answered, "No, sir," to an inquiry as to whether in his opinion any of David's faculties were impaired at that time to render him unable to operate a motor vehicle safely.

Sergeant Bader had met David and his two friends outside of Tony Mart's cafe about 1:15 A.M., having gone there in response to a radio dispatcher's call that there was some trouble down there. When he arrived at the cafe the sergeant ascertained that the three had wanted to go inside and were not permitted for some unknown

reason. In all events, the three went with the sergeant to City Hall and after some conversation there they went on their way. This police officer, in answer to the hearing officer's question, reiterated that as to physical condition David gave no impression that he had been drinking alcoholic beverages, except for "a slight odor of alcohol on his breath." He testified that David's "attitude in speech and everything was very clear."

Further evidence that David's faculties were not impaired by the consumption of the beers consisted of the testimony of Leo T. Clark, a private investigator who had retired from the F.B.I. after 22 years service as a special agent. He checked the distance from the Somers Point City Hall to the scene of the accident and found it to be 7.6 miles. In traversing that distance there are 18 curves. Obviously, David had negotiated all of these curves safely until the last one. When Clark questioned David on August 27, 1965, David told him that he had dropped off one of his friends before the accident, merely pulling up in front of the house to do so. In response to a question by the State's attorney on cross-examination, Clark further testified:

> "He [David] told me at that time that he thought the left tire blew, because he said the car suddenly went out of control and he was unable to keep the car on the road; that it veered over to the left, and he said that he was aware of the fact that the car began to bang against things * * *."

We can appreciate that the Director had a feeling that the consumption of alcohol may have played a part in the accident. But to reach the conclusion that it did upon the paucity of proof herein—that David had consumed five or six beers over a period of two or three hours before 1 P.M. and none thereafter—would require a complete discounting of Sergeant Bader's testimony, the evidence of the safe negotiation of 17 curves before the mishap, and the plausible explanation that a tire blowout had caused David to lose control of the car.

IV.

The Director found that the credibility of David was impaired by his testimony at the hearing when, after testifying that he was traveling west at the time and place in issue within the 50-mile speed limit and not in a careless and heedless manner, David swore that he "didn't remember" what happened. He did not remember having made the statements testified to by the two police officers. His explanation was that he had received an injury to his head and, as he put it, "my head has been bothering me ever since the accident." He now has dizzy spells. The Dircetor noted that David apparently remembered a few days after the accident when he furnished details to the investigator hired in his behalf, Mr. Clark.

Appellate courts must defer, as a general rule, to the better opportunity of the trier of the facts to observe the demeanor of the witnesses and to adjudge of the credibility of any witness. *Abeles* v. *Adams Engineering Co., Inc.*, 35 *N. J.* 411, 424 (1961). However, the Director's appraisal of David's crebility was not based upon his having testified before her personally. Therefore, we are under no mandate to defer to her assessment of credibility in place of our own. The hearing officer did not evaluate the credibility of any witness. Moreover, his report and the final decision of the Director do not evaluate the evidence offered in David's behalf or controvert it.

There was proof by an employee of the owner of the wrecker which towed away David's automobile from the scene that the left tire and wheel could not be found, even after a search had been made. Their absence lends further plausibility to the tire blowout as the effective cause of the accident.

We conclude that there was not sufficient competent and substantial evidence offered to sustain the State's burden of proving by a preponderance of the evidence that David drove his automobile carelessly and on the wrong side of

the highway in violation of the Motor Vehicle Act, or while his ability to drive was impaired by reason of the consumption of alcoholic beverages.

The order of the Director suspending David's driving privileges for two years is reversed.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

A-735-66

MINORITY OPINION OF APPELLATE DIVISION, SUPERIOR COURT OF NEW JERSEY.

JOSEPH M. DAVID,

Appellant,

vs.

JUNE STRELECKI, Director of Motor Vehicles,

Respondent.

CARTON, *J.A.D.*, dissenting.

October 24, 1967.

In my view there was substantial evidence in the whole record from which the Director of Motor Vehicles could reasonably conclude, as she did, that at the time of the accident which resulted in Teti's death David operated the automobile in a careless manner (*R. S.* 39:4-97), and that he failed to drive upon the right-hand side of the highway (*R. S.* 39:4-82). The suspension of appellant's driving privileges for some period of time was consequently warranted and the determination to this effect should not be disturbed on appeal. *Atkinson* v. *Parsekian*, 37 *N. J.* 143, 149 (1962).

However, since it may be debatable whether there was sufficient evidence to support the additional finding that appellant's consumption of alcoholic beverages affected his ability to operate the automobile properly and safely, and since the order of suspension does not indicate to what extent it relies on each of the individual findings, I would remand the matter to the Director for the purpose of imposing a suspension consonant with the first two findings.

Let us briefly review the evidence before the Director to ascertain whether there was substantial evidence which a reasonable mind must accept as adequate to support her conclusions. During the evening of August 23, 1965, appellant David was driving a Pontiac Le Mans in the Bridgeton area accompanied by several acquaintances. Between 10:30 P. M. and midnight, David and his passengers, Charles Teti and Danny Peterson, consumed a sixpack of beer. At about midnight, they drove toward Somers Point. On the way they stopped at Patcong Inn where he and Danny Peterson consumed more beer. At Somers Point David consumed between three and four 12-ounce bottles of beer at a tavern called Tony Mart's.

At about 1:15 that morning officer Lyn Bader of the Somers Point Police was dispatched to Tony Mart's to investigate a disturbance. This officer testified that upon arriving he observed David and two of his friends standing outside in an excited condition. He took the boys to the parking lot near the building and talked with them a short while. At the police officer's request, they accompanied him to City Hall, Peterson driving appellant's car. According to Bader, appellant and his two friends appeared "perturbed" and "excited" because they were not permitted entry into Tony Mart's tavern. He talked further with them and then released them after they "calmed down." Officer Bader expressed the opinion that at that time appellant was not under the influence of alcohol. However, he also commented that David "might have had a drink or two."

On leaving Somers Point, appellant drove Peterson to his home. After dropping him off, accompanied by Charles Teti in the front seat on the passenger side, he drove in a westerly direction approximately a mile and a half to two miles on County Road No. 559. He then failed to negotiate a sharp curve and the car went off the south side of the road at a point where the road passes over Powell Creek. The vehicle traveled 58 feet along the shoulder of the road, tore

away a 20-foot section of the guardrail, then traveled 162 feet along the shoulder and overturned down an embankment. The car was completely turned around, and it was lying on its side, and Charles Teti was lying in the car with his head outside. The appellant climbed out of the car to go for help and went to a house approximately 300 yards away. The occupants called the police at his request. The accident occurred at approximately 2:20 A. M., on August 24, 1965, and the weather and road conditions were described as "clear and dry." The accident resulted in the automobile being "wrecked." The rear axle was broken and the left rear tire and wheel were never recovered.

Appellant was taken to the Somers Point Hospital where he was given sedatives. He was discharged from the hospital on the morning of August 25. Detective Heilfurth of the New Jersey State Police met him at that time and took him to the Mays Landing State Police Station where the appellant made a written statement consisting of three typewritten pages.

In that statement, which contains the notation that it was begun at 10:37 and completed at 11:25 A. M., David described, largely in narrative form and in considerable detail, the events leading up to the accident and his actions thereafter. After taking Danny Peterson home, he stated:

> "* * * From there we headed home, because Charley had to go to work the next day, and I *tried to hurry* because Charley had to get some sleep, he had to go to work at 5:00 o'clock then the next thing I remember was the accident.
>
> Q. Do you know how the accident happened?
>
> A. The only thing I remember is hitting the side of the road, then the car started going into a spin and hitting things.
>
> Q. Can you estimate how fast you were going just before you hit the side of the road?

A. I couldn't estimate the speed, but *I know I was going over the speed limit, I know that.*

Q. Are you familiar with the Somers Point-Mays Landing Rd.?

A. Very familiar." (Emphasis supplied.)

Appellant's admissions that just before he hit the side of the road he was trying to hurry, that he was exceeding the speed limit, and that he was very familiar with the road, coupled with the physical evidence that the car traveled on the shoulder of the left side of the road, then tore away a 20-foot section of guardrail and traveled another 162 feet along the shoulder before overturning down the embankment, certainly warranted, if not compelled, the finding of careless driving and failure to drive on the right-hand side of the road.

The evidence in support of the finding that appellant's consumption of alcoholic beverages affected his ability to operate the automobile properly and safely is less compelling. The record does show that between 10:30 P. M. and 2:20 A. M., when the accident occurred, he consumed a not inconsiderable quantity of beer. Before midnight he had shared with his two companions a six-pack of beer, about mdinight at the Patcong Inn he consumed more beer in an undisclosed quantity, and thereafter at Tony Mart's tavern he drank still more beer, to the extent of three or four 12-ounce bottles. These admitted facts as to his drinking that night and his further admission that he could recollect none of the circumstances as to why or how the car he was driving left the road, as well as the physical evidence at the scene of the tragedy pointing to the conclusion that the car was proceeding at a high rate of speed and that he had lost control of it, give rise to more than a mere suspicion that the consumption of alcoholic beverages was an ingredient in causing the accident.

However, the absence of testimony as to whether or not appellant had also eaten any food during the same period,

the lack of testimony as to the alcoholic content of the beverages which were consumed, as well as the opinion expressed by Officer Bader that appellant was fit to drive when he saw appellant at about 1:15 A. M., renders it questionable whether there was a preponderance of evidence to support the conclusion that the consumption of alcoholic beverages affected appellant's ability to operate the car safely.

Since the evidence given by Trooper Porter has not been considered in this analysis of the evidence, it is unnecessary to determine what weight, if any, should be given to his testimony.

Detective Heilfurth's testimony and David's statement to him as to the circumstances of the accident stand on a different footing. The majority opinion expresses the view that Heilfurth's statement, if admissible, was "far outweighed" in probative value by the other evidence in the case. In assessing the probative value to be attributed to this witness' testimony, as well as that of the other evidence of the case, and in making independent findings of fact, the majority, in my view, departed from the well-defined role to be performed by appellate tribunals in the review of the action of administrative agencies. The appellate court's function under such circumstances is to examine the evidence in order to determine whether there existed substantial evidence on the whole record to support the determination of the administrative agency. Where such evidence appears, that determination should not be disturbed and the appellate tribunal should generally refrain from exercising its power to make independent findings of fact. *Atkinson* v. *Parsekian, supra.*

Moreover, the record amply justifies the Director in giving credence to Detective Heilfurth's testimony and to the written statement obtained from David. True, the appellant had stated to Heilfurth that he had been given a needle and a pill at the hospital. On the other hand, it must be borne in mind that the statement was made after he had

already been discharged from the hospital and there is nothing in the record to support a finding that he was unable fully to understand the nature of the statement which he had given. Detective Heilfurth affirmatively testified that at the time he took appellant's statement "his responses to me were clear and coherrent. * * * [H]e was perfectly well aware of what he was doing, that he was aware of the situation of where he was, the facts relating to the accident." In Heilfurth's opinion David "was entirely competent to give a lucid statement in regards to what happened."

A cursory examination of the statement made by David reveals that he clearly, coherently and quite comprehensively described the events leading up to the time of the accident. Much of it is in narrative form and has the unmistakable ring of truth. The contrast between David's richly detailed written statement and his vague testimony before the Director fully justified her critical comment:

> "* * * In his testimony at the hearing respondent says he could remember nothing about the accident except that he was driving at the lawful speed limit of 50 miles per hour. The credibility of respondent's testimony is impaired considering that the day after the accident he related specific details of his activities on the night of the accident and was able to recall with remarkable clarity details of the accident in an interview with an investigator which he, himself, had employed. Yet at the hearing he remembers nothing except that he was driving lawfully."

The self-serving declaration attributed to appellant by the expert witness Clark that he thought the left tire blew out and the car suddenly went out of control find scant support in the evidence. The Director was entitled to attribute little weight to this explanation of the occurrence in the light of the other evidence from this witness. Also, it should be noted that neither in his statement nor in his

testimony did David even claim that the accident might have resulted from a tire blowout.

The remaining issue (which the majority found unnecessary to decide) is whether the statement given by appellant to Heilfurth was properly admissible in the administrative hearing before the Director. This statement was suppressed in conjunction with the criminal action against appellant as a consequence of which it appears the indictment against David was dismissed. Judge Francis, in granting the motion to suppress the statement, commented that it did not recite certain constitutional requirements "insofar as advising the right to counsel and the right to free counsel and some of the guarantees cited in *Miranda*."

The statement admitted into evidence discloses that Heilfurth asked David to give a voluntary statement concerning the fatal motor accident and that before David made the statement, Heilfurth gave him the following warning:

> "I must advise you that this statement must be given of your own free will and accord, without force, fear, threats or promise of reward. I must also advise you that you have the right to consult an attorney before giving this statement."

I would hold that the warnings prescribed to be given a defendant in a criminal case under the rule laid down by *Miranda* v. *Arizona*, 348 *U. S.* 436, 86 *S. Ct.* 1602, 16 *L. ed.* 3*d* 694 (1966) should not be applicable to quasi-judicial administrative proceedings such as that here involved. The proceedings before the Director involved no custodial sanctions whatsoever—merely the suspension of driving privileges for a period of time. *Cf. State* v. *Zucconi*, 93 *N. J. Super.* 380 (*App. Div.* 1967), presently on appeal to the New Jersey Supreme Court.

The warnings required by *Miranda* are clear pronouncements of a person's rights, as well as the State's obligations in connection with an action of a criminal nature.

There is no basis in precedent or reason why the precise warnings required in *Miranda* should be imported into and made a mandatory recital in administrative proceedings involving infractions of the traffic statute, the consequence of which is the suspension of driving privileges. Legally and practically, a failure to comply with the *Miranda* litany should not automatically cause the exclusion of statements so taken in a driver's license revocation proceeding. The proper standard in such cases is whether the admission of the statement will be so fundamentally unfair as to deprive the appellant of a fair hearing and thus violate the due process requirement of the Fourteenth Amendment.

Appellant was advised that any statement he gave must be given of his own free will and that he had the right to consult an attorney before making such statement. There is nothing in the record which would justify the conclusion that the admission of the statement was fundamentally unfair. On the contrary, there was internal evidence in the statement, as well as the testimony of Heilfurth, which gave support to its trustworthiness and justified the Director in admitting the statement and considering it in arriving at her conclusion.

SUPREME COURT OF NEW JERSEY

A-105 September Term 1967

JOSEPH M. DAVID,
Defendant-Respondent,

vs.

JUNE STRELECKI, Director of Division of Motor Vehicles, State of New Jersey,
Plaintiff-Appellant.

OPINION OF THE SUPREME COURT, STATE OF NEW JERSEY.

Argued April 23, 1968. Decided May 20, 1968.

On appeal from the Superior Court, Appellate Division.

MR. JOSEPH A. HOFFMAN, Assistant Attorney General, argued the cause for the plaintiff-appellant (MR. ARTHUR J. SILLS, Attorney General of New Jersey, attorney; VIRGINIA LONG ANNICH, Deputy Attorney General, of counsel and on the brief).

MR. PATRICK T. MCGAHN, JR. argued the cause for the defendant-respondent.

The opinion of the Court was delivered.

PER CURIAM.

The facts of this case are set forth in the majority and dissenting opinions in the Appellate Division. 97 *N. J. Super.* 360 and 375 (1967).

We agree with the dissenting opinion of Judge Carton that the Appellate Division majority improperly weighed the evidence in the case, thereby exceeding the appellate court's limited function of determining whether the administrative finding was based on substantial evidence in the

record as a whole. *Atkinson* v. *Parsekian*, 37 *N. J.* 143, 149 (1962). Substantially for the reasons set forth in Judge Carton's opinion, we reverse the judgment of the Appellate Division and remand the matter to the Director of Motor Vehicles with instructions to impose a suspension consonant with the Director's valid finding that David operated his automobile in a careless manner and failed to keep to the right side of the roadway. As noted in the dissenting opinion, the Director should modify so much of the penalty as may rest upon the rejected finding that David's consumption of alcoholic beverages affected his ability to operate the motor vehicle safely.

In the circumstances of this case, we think it appropriate that this Court expressly state its view on the applicability of the doctrine of *Miranda* v. *Arizona*, 384 *U. S.* 436, 16 *L. Ed.* 2d 694 (1966) in suspension or revocation proceedings before the Director of Motor Vehicles pursuant to *N. J. S. A.* 39:5–30. We are satisfied that the *Miranda* rule is not constitutionally compelled in proceedings where no *punitive sanctions* are to be imposed. Although it is clear that a driver appearing before the Director of Motor Vehicles in a suspension or revocation proceeding is entitled to those "incidents of fairness which underlie procedural due process," *Bechler* v. *Parsekian*, 36 *N. J.* 242, 256 (1961), it is equally clear that the special rules attaching to criminal proceedings do not extend to administrative hearings of this nature. *Helvering* v. *Mitchell*, 303 *U. S.* 391, 82 *L. Ed.* 917 (1938); 1 Davis, *Administrative Law* § 2.13 (1958). The statutory purpose of the proceeding before the Director is not to punish the driver for infractions of the Motor Vehicle Act—that function is left to the courts. It is settled that, although the suspension or revocation of his operator's license may inconvenience the driver, "the primary object . . . is to foster safety on the highway and not to impose criminal punishment to vindicate public justice." *Atkinson* v. *Parsekian, supra* at 155. The action rests on a determination "that the highway would be a safer place for the public if the violator were removed as a driver for some period of time." *Ibid.* Compare,

One 1958 Plymouth Sedan v. *Pensylvania*, 380 *U. S.* 693, 14 *L. Ed.* 2d 170 (1965), where a proceeding for the forfeiture of an automobile used in transporting illicit liquor was held to be quasi-criminal because the forfeiture was designed to be a *penalty* for the violation of a criminal statute. The decision announced in *Miranda* by its terms deals with a problem of "criminal jurisprudence" (*supra* at 439, 16 *L. Ed.* 2d at 704), and in no way mandates the extension of the exclusionary doctrine to administrative proceedings completely divorced from concepts of criminal law.[1] We therefore hold that any voluntary relevant statement of a licensee may be used by the Director in determining whether highway safety requires the suspension or revocation of the license to operate a motor vehicle in this State.

Because our decision here is based upon the absence of punitive sanctions in these proceedings, we do not express a view on the question discussed in the Appellate Division dissenting opinion herein, 97 *N. J. Super.*, *supra* at 381, whether the application of *Miranda* depends upon the presence or absence of custodial sanctions. The United States Supreme Court has not ruled that the *Miranda* doctrine necessarily applies to all punitive proceedings without regard to the minor nature of the penalty to be imposed, *e.g.*, traffic violations. In accord with traditional principles, we do not reach this constitutional issue since its resolution is not required for the disposition of the matter before us. See *State* v. *Zucconi*, 50 *N. J.* 361, 364 (1967) where this very question was left open; see also *State* v. *Baird*, 50 *N. J.* 376, 380 (1967).

The judgment of the Appellate Division is reversed and the matter is remanded to the Director of Motor Vehicles for a review of the penalty imposed in the light of this opinion.

---

[1] It is to be noted that the purposes of the *Miranda* decision were fulfilled here since the State was not permitted to use David's statements to impose criminal sanctions upon him under an indictment for the crime of causing death by automobile. *N. J. S. A.* 39:113-9. See *Mathis* v. *United States*, 391 *U. S.* 1, *L. Ed. 2d*, 36 *L. W.* 4367 (1968).

SUPREME COURT, U. S.

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Supreme Court of the United States

OCTOBER TERM, 1968

No. 410

JOSEPH M. DAVID,

Petitioner,

v.

JUNE STRELECKI, DIRECTOR OF DIVISION OF MOTOR VEHICLES, STATE OF NEW JERSEY,

Respondent.

BRIEF AND APPENDIX ON BEHALF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

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TABLE OF CONTENTS.

	PAGE
COUNTERSTATEMENT OF QUESTION PRESENTED	1
COUNTERSTATEMENT OF THE CASE	1
ARGUMENT	
POINT I—The petition herein utterly fails to present reasons why this court should grant the relief requested therein	5
CONCLUSION	9
APPENDIX	
Statement of Joseph Michael David	1a

CASES CITED.

Bechler v. *Parsekian*, 36 N. J. 242, 256 (1961)	8
Cresse v. *Parsekian*, 81 N. J. Super. 536 (App. Div. 1964) *aff'd*, 43 N. J. 326 (1964)	6
David v. *Strelecki*, 51 N. J. 563 (1968)	1
Gardner v. *Broderick*, 392 U. S. 273 (1968)	7
Garrity v. *New Jersey*, 385 U. S. 493 (1967)	7
Grosso v. *United States*, 390 U. S. 62 (1968)	7
Haynes v. *United States*, 390 U. S. 85 (1968)	7
Marchetti v. *United States*, 390 U. S. 39 (1968)	7
Mathis v. *United States*, 391 U. S. 1 (1968)	7
Miranda v. *Arizona*, 384 U. S. 436 (1966)	1, *passim*

PAGE

Spivack v. *Klein*, 385 U. S. 511, 17 L. Ed. 2d 574 (1967) 7

State v. *Wade*, 40 N. J. 27 (1963) 8

State v. *Wise*, 19 N. J. 59 (1955) 8

Union Pac. R. R. Co. v. *Public Service Commission*, 248 U. S. 67 (1918) 7

STATUTES CITED.

N. J. S. 2A:113–9 ..... 2, 6

N. J. S. A. 39:4–82 3

N. J. S. A. 39:4–97 3

N. J. S. A. 39:5–30 3

RULES CITED.

R. R. 4:88–8 3

COUNTERSTATEMENT OF QUESTION PRESENTED.

Does the right against self incrimination contained in the fifth amendment to the Federal Constitution and secured by this Court's decision in *Miranda* v. *Arizona*, 384 U. S. 436 (1966) apply to an administrative hearing, solely civil in nature, held to determine whether a driver's license should be suspended?

COUNTERSTATEMENT OF THE CASE.

Petitioner, Joseph M. David (hereinafter sometimes "David") seeks a writ of certiorari to review the judgment of the New Jersey Supreme Court (*David* v. *Strelecki*, 51 N. J. 563 (1968)) affirming the decision and order dated February 24, 1967 of respondent June Strelecki, the Director of the Division of Motor Vehicles, State of New Jersey, suspending his driving privileges for two years.

Early in the morning of August 24, 1965, David and his passenger, one Charles Teti, were traveling in David's car on a county road near Somers Point in Atlantic County, New Jersey. The car missed a sharp curve, left the road, tore away a twenty-foot section of guardrail, rolled down an embankment, and came to rest on its side. The accident killed Teti (P40a-30 to P42a-14).[1]

Prior to the accident, David, Teti and a third youth had been cruising around in David's car in the Bridgeton area (R2a). Between 10:30 p. m., August 23 and 2:20 a. m. August 24, 1965, David and his companions had shared a "six-pack" of beer and had stopped at two taverns, where they drank some more beer (R3a). At the second tavern, they became involved in a disturbance which required the Somers Point Police to be called

[1] Citations to the facts recited herein, unless otherwise indicated, are to the appendix which the petitioner submitted to the Superior Court of New Jersey, Appellate Division and which he filed with this Court as a part of the record herein (Pb2).

(P68a-30 to 40). Sergeant Bader responded to the call and brought the boys to City Hall where, after some discussion, he released them (P69a-28 to 70a-5). After leaving Sergeant Bader, it appears that David proceeded to take his companions home. He dropped the first off at his home and was heading toward Teti's home when the accident occurred (R2a).

After the accident, David and Teti's corpse were taken by ambulance to Somers Point Hospital. David arrived at the hospital sometime after 2:45 a. m. He was under sedation and sleeping (P48a-3 to 10) when, at approximately 5:00 a. m., Trooper Porter of the State Police arrived to question him (P18a). During the course of the questioning David, who was "a bit groggy" (P48a-11, 12)—whether from drink, from sedation, from the accident or from a combination of all three—told Trooper Porter that he was going "over 90 miles an hour at the time of the accident" (Pb44a-20 to 23).

Apparently David was not too badly injured, for he was discharged from the hospital the morning of the following day, August 25, 1965 (Pb57a-20 to 23). Directly upon David's release from the hospital, State Police Detective Heilfurth questioned him. In his three-page, signed statement, David admitted that he was exceeding the speed limit just before the accident occurred (R2a).

David was subsequently indicted under N. J. S. 2A:113–9, death by auto, a misdemeanor punishable by imprisonment for a term not to exceed three years, a maximum fine of $1,000, or both. Prior to trial, David successfully moved in county court to suppress as evidence his statements made before Trooper Porter and Detective Heilfurth (P29a). The court regarded both statements as having been procured in violation of the requirements set forth in *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Thereafter, the state moved to dismiss the indictment for lack of evidence (P30a).

A short time before David's successful motion to suppress, the respondent commenced administrative proceedings to suspend his driving privileges (N. J. S. A. 39:5–30; P30a). As a basis therefor, the respondent alleged that the accident and Teti's death resulted from David's careless driving—brought about in some measure by his consumption of alcoholic beverages—in a manner so as to endanger life or property and from his failure to keep to the right of the roadway (N. J. S. A. 39:4–97; 39:4–82).

David requested and received a hearing on the proposal to suspend his license. During the course thereof, Trooper Porter testified concerning the statement that David made to him at the hsopital (P43a-35 to 44a-23). David's written statement which Detective Heilfurth took was also admitted into evidence (P59a-40 to 43; see appendix hereto R1a-5a). In each instance, the evidence was received over David's objection (P43a-40 to 44a-3; P58a-10 to 18). He maintained that just as *Miranda* required the county court to exclude this evidence in a criminal proceeding resulting from the accident, it equally required the respondent to exclude it in a related administrative proceeding.

As we have noted, the respondent, by decision and order dated February 24, 1967, then suspended David's driving privilege for two years (P102a-105a). Trooper Porter's evidence and David's statement given to Detective Heilfurth constituted major factors in the respondent's decision (P103a-35 to 39; P103a-39 to 104a-4).

David appealed the respondent's order to the Superior Court, Appellate Division pursuant to R. R. 4:88–8. The Appellate Division reversed, holding that Trooper Porter's testimony concerning David's statement to him at the hospital should have been excluded under a doctrine of "fundamental fairness" (97 N. J. Super. at 369), and that the probative value of David's statement to Heilfurth was outweighed by other evidence at the hearing (97 N. J. Super. at 371). The majority decision expressly refused to decide whether *Miranda* should apply to administrative proceed-

ings (97 N. J. Super. at 371, 372), basing its decision—after holding that the hearing officer should have rejected Trooper Porter's testimony—on the conclusion that respondent's determination and order were not supported by substantial record evidence (97 N. J. Super. at 372).

Judge Carton wrote a dissenting opinion which held that David's statement to Heilfurth—the opinion expressly did not consider Porter's testimony concerning the statement which David made to him—together with other evidence introduced at the hearing warranted the respondent's decision and order. Unlike the majority, Judge Carton faced the *Miranda* issue and squarely held that its doctrine had no application to administrative proceedings (97 N. J. Super. at 381).

The Supreme Court reversed the Appellate Division, largely on the basis of Judge Carton's dissent. It too squarely held that *Miranda* has no application to the administrative process which, unlike the criminal process, contemplates no punitive sanctions (51 N. J. at 565, 566).

ARGUMENT.

POINT I.

The petition herein utterly fails to present reasons why this Court should grant the relief requested therein.

The petition herein presented serves as an excellent example of the ability of competent counsel to raise a non-issue. Essentially, petitioner urges that the exclusionary rule of *Miranda* v. *Arizona*, 384 U. S. 436 (1966) should be applied to evidence offered in an administrative proceeding held to determine whether a driver's license should be suspended.

In the circumstances of the within petition, it is important to note that the purpose of the *Miranda* rule is to secure the fifth amendment privilege against self incrimination which, by its very terms, applies only to criminal cases.[2]

The background of the *Miranda* rule is found in criminal jurisprudence (484 U. S. at 439). This Court discerned a history of in-custody interrogation practice which—at the very least—diminished the individual's ability effectively to avail himself of the privilege against self incrimination. In pp. 445-446 of its decision, and particularly in nn. 5 and 6 therein, we find examples of the interrogation practices against which the rule is directed. These practices took place in the circumstances of criminal investigations in which the police sought to obtain a confession from one suspected of committing the crime under investigation. Only in this context does the *Miranda* rule have relevance, for

[2] "No person . . . shall be compelled *in any criminal case* to be a witness against himself . . . " (emphasis ours). Thus, the right against self incrimination refers to the compulsion exerted upon an individual to provide evidence which will expose him to criminal penalties, e. g., fine or imprisonment. Petitioner's argument is that somehow the right against self incrimination inheres to a motor vehicle proceeding—despite the fact that such a proceeding is hardly a criminal case—and that the *Miranda* rule must be applied to the administrative hearings held therein in order to safeguard that right.

its purpose is to discourage, if not to forestall, the practices which prompted its creation.[3]

The rule operates to exclude as evidence, in criminal prosecutions, any confession or admission procured in the absence of the warnings which the rule requires to be given.

It is plain that the *Miranda* rule has no application to the administrative proceedings resulting in the suspension of petitioner's driver's license. The application of the rule in the criminal proceedings against him serves clearly to illustrate this point. Petitioner successfully moved, prior to trial on the indictment rendered against him under N. J. S. 2A:113–9, death by auto, to suppress the statements made to Trooper Porter and taken by Detective Heilfurth. In this context, petitioner's statements were self incriminatory, in that they provided evidence which could have led to his conviction of a misdemeanor which, in New Jersey, is an indictable offense calling for a maximum prison term of three years, a fine of $1,000, or both.

However, when we view the administrative proceedings to which petitioner was subject, we see an entirely different story. Surely, by no stretch of the imagination could these proceedings be regarded as a criminal case. They did not expose petitioner to imprisonment or a fine; they merely resulted in a two year suspension of his driving privileges. The purpose behind a suspension is temporarily to rid New Jersey's highways—for a period necessary to reform his driving habits—of a driver whose conduct endangers other drivers and himself. Quite obviously, the sole purpose behind a suspension—unlike a fine or an imprisonment—is not penal. *Cresse* v. *Parsekian*, 81 N. J. Super. 536 (App. Div. 1964) *aff'd*, 43 N. J. 326 (1964).

Petitioner's suggestion that a rule designed to safeguard an individual's right not to be "compelled in any criminal

[3] Thus, *Miranda* is a response to an empirically perceived problem. We seriously doubt that research would reveal many—if any—situations in which police officers or motor vehicle inspectors "sweated" drivers to procure admissions for use in administrative proceedings looking toward the suspension of the offender's driver's license.

case to be a witness against himself" be applied to this motor vehicle proceeding, entirely civil in nature, is frivolous.

Moreover, the decisions following *Miranda*, which petitioner cites in his brief, are entirely irrelevant to the position which he maintains. He makes particular reference to the fifth amendment cases such as *Grosso* v. *United States*, 390 U. S. 62 (1968); *Haynes* v. *United States*, 390 U. S. 85 (1968); *Marchetti* v. *United States*, 390 U. S. 39 (1968); *Mathis* v. *United States*, 391 U. S. 1 (1968); *Gardner* v. *Broderick*, 392 U. S. 273 (1968) and *Spivack* v. *Klein*, 385 U. S. 511, 17 L. Ed. 2d 574 (1967). He could also have included *Garrity* v. *New Jersey*, 385 U. S. 493 (1967). These decisions hold that the state cannot compel the individual to choose "between the rock and whirlpool",[4] in that it cannot impose a penalty upon the exercise of the privilege against self incrimination.

Accordingly, the state may not compel an individual to waive his right against self incrimination by subjecting him to a criminal penalty if he does not (*Grosso* v. *United States, supra; Haynes* v. *United States, supra; Marchetti* v. *United States, supra; Mathis* v. *United States, supra).* Nor may it compel a waiver of the right by impairing the person's ability to earn a living in his chosen profession if he asserts it *(Gardner* v. *Broderick, supra; Spivack* v. *Klein, supra; Garrity* v. *New Jersey, supra).*

The decisions which petitioner cites would have relevance only if New Jersey provided that a driver who refused to make a statement to the police in circumstances where the statement was incriminatory and the privilege was thus properly invoked (*cf., Spivack* v. *Klein, supra,* at 517-518) was subject to revocation or suspension of his license. However, no such statute or practice exists in New Jersey.

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[4] *Garrity* v. *New Jersey, supra,* at 498-499, citing *Union Pac. R. R. Co.* v. *Public Service Commission,* 248 U. S. 67 (1918).

Thus, petitioner's self incrimination argument is patently hollow. The only position remaining to him is that the admission of his statements at the administrative hearing violated a concept of fundamental fairness secured through the due process clause of the fourteenth amendment. (*cf.*, *Bechler* v. *Parsekian*, 36 N. J. 242, 256 (1961)). In this context, we point out that nowhere in the proceedings below did he urge that his oral statement to Trooper Porter and the written statement to Detective Heilfurth were not voluntary. Petitioner seems to imply that they were not by claiming that both statements were made while he was under sedation.

Trooper Porter interviewed the petitioner approximately 2½ hours after the accident occurred, after he was sedated and thereafter awakened. The mere fact that petitioner had recently been sedated prior to making the statement is not, in and of itself, sufficient to exclude it as involuntary. *State* v. *Wade*, 40 N. J. 27 (1963); *State* v. *Wise*, 19 N. J. 59 (1955).

The written statement which petitioner gave to Detective Heilfurth is coherent, initialed and signed. It was made after petitioner was discharged from the hospital. While the statement recites that petitioner received a "needle and a pill" (R5a) there is no indication when these medicines were administered or what they were. For aught the record shows, they were mild tranquilizers. The claim of a "needle and a pill" may relate to the sedation which petitioner received shortly after he was admitted to the hospital some thirty hours before his statement was taken.

We further note that Detective Heilfurth gave petitioner all the warnings which *Miranda* requires, save the one which would have informed him that, if he was unable to retain an attorney, one would be appointed to represent him during the course of the questioning (R1a). Since the petitioner has been represented by retained counsel throughout, even up to and including this Court, we

wonder what practical relevance this omission has to the voluntariness of his statement to Detective Heilfurth. In any event, there can be no doubt whatsoever that petitioner's statement to Detective Heilfurth was entirely a voluntary act and, therefore, that its admission in the administrative proceedings did not result in any unfairness, fundamental or otherwise.

CONCLUSION.

Since the decision of the New Jersey Supreme Court is in accord with both the applicable decisions of this Court and the United States Constitution, respondent respectfully submits that the within petition for a writ of certiorari to the Supreme Court of New Jersey should be denied.

Respectfully submitted,

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On the Brief.

APPENDIX.

N. J. State Police, Mays Landing, N. J., August 25, 1965.
Time started 10:37 A. M.

STATEMENT OF JOSEPH MICHAEL DAVID.

Mr. David, I am Det. Heilfurth of the N. J. State Police at Mays Landing, N. J. I am going to ask you to give me a voluntary statement concerning a fatal motor vehicle accident that occured about 2:22 A. M., August 24, 1965, on the Somers Point-Mays Landing Rd., Egg Harbor Twp., Atlantic County, N. J. in which you were the operator of the vehicle, and in which one Charles Teti, died. I must advise you that this statement must be given of your own free will and accord, without force, fear, threats of promise of reward. I must also advise you that you have the right to consult an attorney before giving this statement. Do you understand this warning?

A. Yes.

Q. Are you willing to give me this statement?

A. Yes.

Q. What is your full name and address?

A. Joseph Michael David, 25 Taylor St., Bridgeton, N. J.

Q. When and where were you born?

A. I was born September 21, 1944, Bridgeton, N. J.

Q. How far did you go in school?

A. I graduated 12th grade.

Q. Are you married?

A. Yes, I am.

Q. Directing your attention to the night of August 23, 1965 and the early morning hours of August 24, 1965, will you tell me of your activities prior to, and up to the accident in which you were involved?

A. Early in the evening I'd say about 8:00 o'clock, I met my brother-in-law, William Penn, and we was riding around Bridgeton, till about 10:30, and the deceased Charles Teti was with us. At 10:30 Bill had to go to work, he told me to take his car and pick him up in the morning. I was riding around and met a buddy Danny Peterson, in Bridgeton. He told me that his car had busted down, he had to have an estimate on it the next day, and he had no way to work, and he asked me if I'd do him a favor by running up here to Somers Point where he worked. He took his car over to Ed. Tables body shop in Bridgeton, and I followed him. This would be about 12 midnight. From there I come down the shore with him, took a ride down to the Point, where Tony Mart's is at. The three of us went in Tony Mart's, we stayed there until maybe 1 o'clock, I guess, and from Tony Mart's I took Danny Peterson home. He lives on the same road where the accident happened, I'm not sure of the house. From there we headed home, because Charley had to go to work the next day, and I tried to hurry because Charley had to get some sleep, he had to go to work at 5 o'clock then the next thing I remember was the accident.

Q. Do you know how the accident happened?

A. The only thing I remember is hitting the side of the road, then the car started going into a spin and hitting things.

Q. Can you estimate how fast you were going just before you hit the side of the road?

A. I couldn't estimate the speed, but I know I was going over the speed limit, I know that.

Q. Are you familiar with the Somers Point-Mays Landing Rd.?

A. Very familiar.

Q. How many times would you say you travelled that particular road?

A. I travelled it every weekend last summer, and this year about six times. Most of the time I wasn't doing the driving on this road.

Q. How much did you have to drink while you were in Tony Marts?

A. About 3 beers, 4 beers.

Q. What did you have, glasses or bottles?

A. Bottles. They were the 12 ounce bottles.

Q. Did you have anything to drink prior to going to Tony Marts?

A. Yes, I had a six pack in the car.

Q. Who drank this six pack?

A. The three of us.

Q. After you left Tony Marts, did you stop any other place, before the accident?

A. No. I did stop at the Patcong Inn on the way up, and me and Danny had a beer there. Teti was sleeping on the back seat.

Q. Do you remember where the house was that you dropped Danny Peterson off?

A. It was on the same road, maybe a quarter mile from the Patcong Inn going away from Somers Point, towards Mays Landing.

Q. After you dropped Danny Peterson off, were you driving the car?

A. Yes.

Q. Where was Charles Teti located in the car?

A. He was in the front seat on the passengers side.

Q. Was Charles Teti asleep at the time of the accident, do you know?

A. No, I don't believe he was. As a matter of fact, I know he wasn't.

Q. How do you know he wasn't?

A. We was speaking right before the accident.

Q. Do you know what caused the accident?

A. No, I remember hitting the side of the road, I don't know if I dozed off or what, everything happened so fast.

Q. What kind of a car were you operating at the time of the accident?

A. A 65 Pontiac LeMans.

Q. How far would you say the accident was from the house where you dropped Danny Peterson off.

A. Approximately a mile and a half, or two miles.

Q. Is there anything else that you would like to add to this statement?

A. Right after the accident, the car was completely turned around, and it was lying on its side, I remember Charley lying in the car, with his head outside, and it looked like the car was lying on his head, and he said "Joe help me", I climbed out of the car to go for help, the blinker and radio was still on, and I turned the radio off. I went to a house maybe three hundred yards up the street. The lady and the boy woke up and I told them about the accident, and they called the police.

Q. Can you read and write?

A. Yes.

Q. Has this been a voluntary statement?

A. Yes.

Q. Have you been abused or mistreated in any manner before or during the taking of this statement?

A. No.

Q. Have you been fully aware of what you have said to me in giving this statement?

A. Yes.

Q. Are you presently under medication?

A. They gave me a needle and a pill at the hospital. I don't know what they were, they said they would calm my nerves.

Q. Mr. David, I am going to ask you to read this statement, consisting of three typewritten pages.

Q. Mr. David, have you read the foregoing three typewritten pages of this statement?

A. Yes.

Q. Are there any corrections or changes that you wish made in this statement?

A. No.

Q. Has this been a true statement?

A. Yes.

Q. Will you now sign this statement, as a true statement?

A. Yes.

Time completed 11:25 A. M.

Signed JOSEPH MICHAEL DAVID.

Witness: DETECTIVE HEILFURTH, No. 916.